

**Congress of the United States**  
**Washington, DC 20515**

February 12, 2014

The Honorable Kamala D. Harris  
Attorney General  
State of California  
California Department of Justice  
P.O. Box 944255  
Sacramento, CA 94244-2550

The Honorable Tom Miller  
Attorney General  
State of Iowa  
1305 E. Walnut Street  
Des Moines, IA 50319

The Honorable William H. Sorrell  
Attorney General  
State of Vermont  
109 State Street  
Montpelier VT 05609-1001

Dear Attorneys General Harris, Miller, and Sorrell:

Last month marked the 50th anniversary of the landmark first Surgeon General's Report on Smoking and Health. Over the last 50 years, tremendous progress has been made. Adult and youth smoking rates have been cut in half or more; and millions of premature, smoking-related deaths have been prevented. But as a new report from the Surgeon General makes clear, tobacco use continues to take a tremendous health and economic toll on Americans, and thousands of youth experiment with tobacco products each day.

We are writing to ask you to consider taking a bold step in the battle against tobacco use: classify electronic cigarettes as cigarettes under the Master Settlement Agreement (MSA) with the tobacco companies.

This action would have an immediate and much needed impact because it would stop the electronic cigarette -- or e-cigarette -- makers from marketing their products in ways that are appealing to kids. Bringing e-cigarettes under the Master Settlement Agreement would not remove them from the market or make them unavailable to adults who may see them as a safer alternative to conventional cigarettes. But it would bar the manufacturers from targeting youth, using cartoons and youth-oriented sponsorships to promote their products, and advertising on outdoor billboards.

You have been leaders in the anti-smoking movement. We can think of no better way to acknowledge the efforts of the last 50 years and to start the next phase of the campaign against

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tobacco use than acting now to prevent e-cigarette companies from preying on our children with their addictive and dangerous products.

### **Background**

New data from the Centers for Disease Control and Prevention (CDC) show an emerging epidemic of e-cigarette use by children. Use of e-cigarettes by youth doubled in just one year from 2011 to 2012.<sup>1</sup> The CDC data suggest that e-cigarettes could serve as a gateway product to nicotine addiction. Over 20% of the middle school students who reported using e-cigarettes said they had never tried traditional cigarettes.<sup>2</sup> As CDC Director Tom Frieden stated: “Many teens who start with e-cigarettes may be condemned to struggling with a lifelong addiction to nicotine and conventional cigarettes.”<sup>3</sup> Youth use of these products is particularly troubling since the full extent of e-cigarette harms is not yet understood, and studies to date have found that e-cigarettes contain carcinogens, toxic chemicals, and potentially harmful constituents.<sup>4</sup>

One of the primary causes of the rising use of e-cigarettes by children is the lack of effective regulation. E-cigarettes are subject to none of the restrictions on advertising and marketing that apply to conventional cigarettes. E-cigarette makers are advertising their products on TV and radio. They are using cartoon imagery, sports sponsorships, and candy flavors. Their print advertisements feature celebrities and sex appeal. In fact, as Rep. Waxman wrote Food and Drug Administration (FDA) Commissioner Margaret Hamburg in November, “e-cigarette manufacturers appear to be using exactly the same advertising and promotional

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<sup>1</sup> Centers for Disease Control and Prevention, *Notes from the Field: Electronic Cigarette Use Among Middle and High School Students – United States, 2011-2012* (Sept. 6, 2013) (online at [www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm?s\\_cid=mm6235a6\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm?s_cid=mm6235a6_w)).

<sup>2</sup> *Id.*

<sup>3</sup> Centers for Disease Control and prevention, *E-cigarette use more than doubles among U.S. middle and high school students from 2011 to 2012* (Sept. 5, 2013) (online at [www.cdc.gov/media/releases/2013/p0905-ecigarette-use.html](http://www.cdc.gov/media/releases/2013/p0905-ecigarette-use.html)).

<sup>4</sup> Centers for Disease Control and Prevention, *Electronic Cigarette Use Among Middle and High School Students — United States, 2011–2012*, Morbidity and Mortality Weekly Report (MMWR) (Sept. 6, 2013) (online [www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6235a6.htm)); Food and Drug Administration, *FDA and Public Health Experts Warn About Electronic Cigarettes* (July 22, 2009) (online at [www.fda.gov/newsevents/newsroom/pressannouncements/ucm173222.htm](http://www.fda.gov/newsevents/newsroom/pressannouncements/ucm173222.htm)).

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techniques that were used for decades by cigarette manufacturers to hook teenagers on their products.”<sup>5</sup>

We have urged FDA to curb the youth targeting of e-cigarette makers by deeming e-cigarettes to be tobacco products under the Family Smoking Prevention and Tobacco Control Act.<sup>6</sup> But this has been a slow process. Moreover, if e-cigarettes are deemed tobacco products under the law, additional rulemakings could be required before the agency imposes commonsense restrictions on the marketing practices of e-cigarette makers.<sup>7</sup>

That is why we are writing to urge you to consider using your authority under the MSA to take immediate and decisive action against the efforts of e-cigarette companies to target children.

### **E-Cigarettes and the Master Settlement Agreement**

We believe e-cigarettes meet all the criteria for the definition of cigarette (and tobacco product) in the Master Settlement Agreement. In fact, the MSA contemplated that novel products -- like e-cigarettes -- would later meet the definition of cigarette. Inclusion of these products in the definition of cigarette is consistent with the MSA’s overarching goal of protecting America’s youth from the harms of tobacco use.

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<sup>5</sup> Letter from Rep. Henry A. Waxman, Rep. Diana DeGette, and Rep. Frank Pallone, Jr. to Margaret Hamburg, Commissioner of the Food and Drug Administration (Nov. 4, 2013) (online at <http://democrats.energycommerce.house.gov/index.php?q=news/ranking-members-warn-of-dangers-of-e-cigarette-advertising>)

<sup>6</sup> Letter from Rep. Henry A. Waxman, et al. to Margaret Hamburg, Commissioner of Food and Drugs (Nov. 4, 2013) (online at <http://democrats.energycommerce.house.gov/index.php?q=news/ranking-members-warn-of-dangers-of-e-cigarette-advertising>); Letter from Rep. Henry A. Waxman, et al. to Margaret Hamburg, Commissioner of Food and Drugs (Sept. 16, 2013) (online at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Hamburg-Adolescent-Use-of-E-Cigarette-2013-9-16.pdf>); Sen. Dick Durbin, Sen. Richard Blumenthal, Sen. Tom Harkin et al., *Durbin, Blumenthal, Harkin, Carper, Brown, and Markey Warn Against Dangers of E-Cigs After CDC Release Data Showing an Increase in Use Among Youth* (Sept. 5, 2013) (online at [www.durbin.senate.gov/public/index.cfm/pressreleases?ID=5ce7cae6-142b-46df-b3ad-dd0c16789380](http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=5ce7cae6-142b-46df-b3ad-dd0c16789380)).

<sup>7</sup> Letter from Sally Howard, Food and Drug Administration Deputy Commissioner of Policy, Planning, and Legislation to Henry A. Waxman, Ranking Member of the Committee on Energy and Commerce of the U.S. House of Representatives (Nov. 14, 2013).

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The MSA defines “tobacco products” as “cigarettes and smokeless tobacco products.”<sup>8</sup>  
In turn, “cigarettes” are defined as follows:

any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition.<sup>9</sup>

We believe e-cigarettes meet this definition. They “contain nicotine.” They are “heated under ordinary conditions of use.” They “contain ... tobacco, in any form” because their key ingredient is nicotine, which is produced from tobacco leaves. And they are “likely to be offered to, or purchased by, consumers as a cigarette.” In fact, the whole e-cigarette experience is designed to resemble cigarette use through sales of e-cigarettes in packs (like traditional cigarettes), the vapor inhalation process replicating a traditional smoking experience, and the glow of the e-cigarette tip mimicking what happens when users take a drag of a combustible cigarette.<sup>10</sup>

Classifying e-cigarettes as cigarettes under the MSA would have immediate benefits. A principal goal of the MSA is “reducing underage tobacco use by discouraging such use and by preventing [y]outh access to [t]obacco [p]roducts.”<sup>11</sup> Tobacco companies subject to the MSA are prohibited from taking any action “directly or indirectly, to target [y]outh ... in the advertising, promotion or marketing of [t]obacco [p]roducts, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of [y]outh smoking.”<sup>12</sup> The MSA bans the use of cartoon images to advertise or promote tobacco products; prohibits brand-name sponsorship of

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<sup>8</sup> *Master Settlement Agreement* (1998) (online at <http://oag.ca.gov/sites/all/files/agweb/pdfs/tobacco/lmsa.pdf?>).

<sup>9</sup> *Id.*

<sup>10</sup> blu, *How it Works* (online at [www.blucigs.com/how-it-works-starter-pack](http://www.blucigs.com/how-it-works-starter-pack)) (accessed Jan. 12, 2014); K. Tate, *Vaping: How E-cigs Work (Infographic)*, Life Science (Nov. 14, 2013) (online at [www.livescience.com/41211-how-electronic-cigarettes-work-infographic.html](http://www.livescience.com/41211-how-electronic-cigarettes-work-infographic.html)).

<sup>11</sup> *Supra* note 8.

<sup>12</sup> *Supra* note 8.

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youth-oriented events; restricts outdoor advertising of tobacco products; outlaws gifts without proof of age; and prohibits payments to promote tobacco products in movies and other forms of media.<sup>13</sup>

We understand that there is a debate within the public health community about the value of e-cigarettes as an alternative to conventional cigarettes for adult smokers. But no one should be in favor of the use of these products by children. By taking action to apply the MSA to e-cigarettes, you could make a giant stride in protecting kids from a lifelong addiction to nicotine.

### Conclusion

We have admiration for your efforts to protect children from the dangers of tobacco. That is why we hope you will consider taking this much-needed step in the ongoing battle against tobacco products. The MSA gives you a powerful tool to stop e-cigarette makers from targeting youth, and we urge you to consider using it.

Sincerely,



Henry A. Waxman  
United States Representative



Tom Harkin  
United States Senator



Peter Welch  
United States Representative

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<sup>13</sup> *Supra* note 8.